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Nos. 10-238 & 10-239

IN THE

Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, *ET AL.*,

Petitioners,

v.

KEN BENNETT, *ET AL.*,

Respondents.

JOHN MCCOMISH, *ET AL.*,

Petitioners,

v.

KEN BENNETT, *ET AL.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICI CURIAE ANTHONY CORRADO, THOMAS MANN AND NORMAN ORNSTEIN IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 4

ARGUMENT 8

I. Public Financing at the Federal Level: The Presidential Public Financing System Upheld in *Buckley* v. *Valeo* 8

II. The Success of the Presidential Public Financing System 13

III. The Constitutionality of Arizona's Matching Grants 19

IV. The Validity Of State And Local Public Financing Systems Generally 21

CONCLUSION 25

TABLE OF AUTHORITIES

Page

Cases:

Buckley v. *Valeo*,
424 U.S. 1 (1976) 5, 6, 12, 21

Citizens United v. *FEC*,
130 S. Ct. 876 (2010) 4

Crawford v. *Marion County Election Board*, 553 U.S. 181 (2008) 24

Daggett v. *Comm'n on Governmental Ethics and Election Practices*,
205 F.3d 445 (1st Cir. 2000) 22

Davis v. *FEC*,
554 U.S. 724 (2008) 19

FEC v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) 2, 4

FEC v. *Wisconsin Right to Life, Inc.*,
551 U.S. 449 (2007) 4

Green Party v. *Garfield*,
616 F.3d 213 (2d Cir. 2010) 23

Gregory v. *Ashcroft*,
501 U.S. 452 (1991) 24

McComish v. *Bennett*,
611 F.3d 510 (9th Cir. 2010) 18, 19, 20

McConnell v. *FEC*,
251 F. Supp. 2d 176 (D.D.C. 2003) 3

McConnell v. *FEC*,
540 U.S. 93 (2003) 2, 19

TABLE OF AUTHORITIES—Continued

Page

N.C. Right to Life Comm. v. Leake,
524 F.3d 427 (4th Cir. 2008) 22

Nixon v. Shrink Mo. Gov't PAC,
528 U.S. 377 (2000) 4, 23

Northwest Austin Mun. Utility Dist. No. One v. Holder, 129 S. Ct. 2504 (2009) 24

Oregon v. Mitchell,
400 U.S. 112 (1970) 24

Purcell v. Gonzalez,
549 U.S. 1 (2006) 23

Republican Nat'l Comm. v. FEC,
487 F. Supp. 280 (S.D.N.Y.), *aff'd*,
445 U.S. 955 (1980) 12

Rosenstiel v. Rodriguez,
101 F.3d 1544 (8th Cir. 1996) 20, 23

Storer v. Brown,
415 U.S. 724 (1974) 24

Vieth v. Jubelirer,
541 U.S. 267 (2004) 4

Vote Choice, Inc. v. DiStefano,
4 F.3d 26 (1st Cir. 1993) 20, 23

Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442 (2008) 24

Wilkinson v. Jones,
876 F. Supp. 916 (W.D. Ky. 1995) 23

TABLE OF AUTHORITIES—Continued

Page

Wisconsin Right to Life, Inc. v. *FEC*, 546 U.S. 410 (2006) (per curiam) 4

Statutes:

2 U.S.C § 431 *et seq.* 8

26 U.S.C. § 9001 *et seq.* 8

26 U.S.C. § 9003 10

26 U.S.C. §§ 9003(b), (c) 9

26 U.S.C. § 9004 10

26 U.S.C. § 9004(a)(3) 11

26 U.S.C. § 9008(b)(2) 12

26 U.S.C. §§ 9008(d)(1), (d)(2) 9

26 U.S.C. § 9031 *et seq.* 8

26 U.S.C. § 9033(a)(3) 10

26 U.S.C. § 9033(b)(1) 9

26 U.S.C. §§ 9033(b)(3), (b)(4) 9

26 U.S.C. § 9034(a) 9, 10

26 U.S.C. § 9034(b) 10

26 U.S.C. § 9035(a) 9

TABLE OF AUTHORITIES—Continued

Page

Legislative Materials:

S. Rep. No. 93-689 (1974) 9, 12

Rule:

S. Ct. R. 37.6 1
S. Ct. R. 37.3(a) 4

Other Authorities:

Ballot Propositions Publicity Pamphlet for the 1998 Ariz. General Election 19

Anthony Corrado, *The Changing Environment of Presidential Campaign Finance*, *in* IN PURSUIT OF THE WHITE HOUSE: HOW WE CHOOSE OUR PRESIDENTIAL NOMINEES (William G. Mayer ed., 1996) 17

Anthony Corrado, BEYOND THE BASICS: CAMPAIGN FINANCE REFORM (2000) 2

Anthony Corrado, *Participation, Competition, Engagement: How to Revive and Improve Public Funding for Presidential Nomination Politics* (2003) 2

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TABLE OF AUTHORITIES—Continued

Page

Anthony Corrado, *Public Funding of Presidential Campaigns*, *in* THE NEW CAMPAIGN FINANCE SOURCEBOOK (Anthony Corrado, Thomas E. Mann, *et al.* eds., 2005) 10, 11, 13, 14

Anthony Corrado, *So the Voters May Choose . . . Reviving the Presidential Matching Fund System* (2005) 2

Anthony Corrado, Michael J. Malbin, Thomas E. Mann & Norman J. Ornstein, REFORM IN AN AGE OF NETWORKED CAMPAIGNS (2010) 3

Federal Election Commission, *Presidential Election Campaign Fund (PECF)* 10, 11

John C. Green, *Financing the 2004 Presidential Nomination Campaigns*, *in* FINANCING THE 2004 ELECTION (David B. Magleby, Anthony Corrado & Kelly Patterson eds., 2006) 14

Jessica A. Levinson, Center for Governmental Studies, *State Public Financing Charts* (2009) 21

Jessica Levinson & Smith Long, Center for Governmental Studies, *Mapping Public Financing in American Elections* (2009) 22

TABLE OF AUTHORITIES—Continued

Page

Michael J. Malbin, *Are Matching Funds Only "For Losers"? A Post-2004 Vision for a Renewed Public Funding System*, WELFARE FOR POLITICIANS? TAXPAYER FINANCING OF CAMPAIGNS (John Samples ed., 2005) 17

Thomas Mann, *Lessons for Reformers*, *in* FINANCING THE 2008 ELECTIONS (Anthony Corrado and David Magleby eds., 2010) 3

Thomas Mann, *Linking Knowledge and Action: Political Science and Campaign Finance Reform*, PERSPECTIVES ON POLITICS (2003) 3

THE NEW CAMPAIGN FINANCE SOURCEBOOK (2005) 2

New York City Campaign Finance Board, *Public Matching Funds* 22

Norman J. Ornstein, THE PERMANENT CAMPAIGN AND ITS FUTURE (2000) 3

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STATEMENT OF INTEREST

Amici curiae are three political scientists who have dedicated much of their careers to studying, analyzing and writing extensively on Congress, federal elections, campaign finance, and American politics.[1]

[1] Pursuant to Supreme Court Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no

Anthony Corrado is a Professor of Government at Colby College and Chair of the Board of Trustees of the Campaign Finance Institute. He was a member of the Campaign Finance Institute's Task Force on Presidential Nomination Financing from 2002 to 2004. As a member of the Task Force, Corrado participated in producing the reports, *So the Voters May Choose . . . Reviving the Presidential Matching Fund System* (2005), and *Participation, Competition, Engagement: How to Revive and Improve Public Funding for Presidential Nomination Politics* (2003). He serves as a Special Advisor to the American Bar Association's Advisory Commission on Election Law, and has served as an expert consultant in several federal election law cases, including *McConnell v. FEC*, 540 U.S. 93 (2003). He served as an expert witness in *FEC* v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001), and this Court cited and quoted his expert statement in its opinion in that case. *See id.* at 449, 451. His publications include *Financing Presidential Nominations under the BCRA*, *in* THE MAKING OF PRESIDENTIAL CANDIDATES (William G. Mayer ed., 2004), and BEYOND THE BASICS: CAMPAIGN FINANCE REFORM (2000), and he was co-editor, with fellow *amicus* Thomas Mann and others, of THE NEW CAMPAIGN FINANCE SOURCEBOOK (2005).

Thomas E. Mann is the W. Averell Harriman Chair and Senior Fellow in Governance Studies at the Brookings Institution. In addition to being co-editor of THE NEW CAMPAIGN FINANCE SOURCEBOOK (2005),

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person or entity other than *amici curiae* and their counsel made a monetary contribution to the preparation or submission of the brief.

he has written many other articles on campaign finance reform, including *Lessons for Reformers*, *in* FINANCING THE 2008 ELECTIONS (Anthony Corrado and David Magleby eds., 2010) and *Linking Knowledge and Action: Political Science and Campaign Finance Reform*, PERSPECTIVES ON POLITICS (2003). He served as an expert witness in *McConnell* v. *FEC*, 251 F. Supp. 2d 176 (D.D.C.), *aff'd in part & rev'd in part*, 540 U.S. 93 (2003), and this Court cited and quoted his expert report in its opinion. *See* 540 U.S. at 124 nn.8, 9, 11 & 12; *id.* at 148 & 155.

Norman J. Ornstein is a Resident Scholar at the American Enterprise Institute for Public Policy Research, and the Co-Director of the AEI-Brookings Election Reform Project. He is the founder and director of the Campaign Finance Working Group, a group of scholars and practitioners that helped craft the McCain-Feingold legislation. His publications include THE PERMANENT CAMPAIGN AND ITS FUTURE (2000).

All three *amici* are co-authors, with Michael J. Malbin, of a recent joint study for the Campaign Finance Institute, the American Enterprise Institute and the Brookings Institution, entitled REFORM IN AN AGE OF NETWORKED CAMPAIGNS (2010). The study urges, among other reforms, increased public funding of federal and state election campaigns, particularly through matching grants of small contributions, *see id.* at 36-46.

Stemming from their expertise and interest in federal elections and campaign finance reform, Professor Corrado, Dr. Ornstein, and Dr. Mann have filed

amici briefs in previous cases before this Court involving election-law issues.[2]

Amici have studied public financing systems in depth, and have played a leading role in the public policy debate concerning public financing systems, their efficacy and needed reforms. *Amici* therefore have a great interest in defending the validity of public financing systems, and in keeping the door open for further reforms which they believe may be necessary to promote greater public participation in our democracy, including greater public financing of state and federal election campaigns.

Amici therefore respectfully offer their views to aid the Court in this case. This brief is filed with the written consent of all parties pursuant to Supreme Court Rule 37.3(a); the requisite consent letters have been filed with the Clerk.

SUMMARY OF ARGUMENT

The matching grant provisions of Arizona's public financing system are constitutional. They serve the important state interest in encouraging participation in the state's public financing system, which is intended to reduce the risk of *quid pro quo* corruption and the appearance of corruption in campaign fundraising. And the record shows that these match-

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[2] *See Citizens United* v. *FEC*, 130 S. Ct. 876 (2010) (Corrado, Mann & Ornstein); *FEC* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) (Corrado, Mann & Ornstein); *Wisconsin Right to Life, Inc.* v. *FEC*, 546 U.S. 410 (2006) (per curiam) (Corrado, Mann & Ornstein); *Vieth* v. *Jubelirer*, 541 U.S. 267 (2004) (Mann & Ornstein); *McConnell*, 540 U.S. 93 (Ornstein); *Colorado Republican*, 533 U.S. 431 (Mann); *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000) (Mann).

ing grants do not in fact significantly burden the First Amendment rights of either non-participating candidates or independent spenders. The powerful arguments in support of the state's matching grant provisions are set out in detail in the briefs of the respondent Arizona state officials and the Clean Elections Institute, and will not be repeated here. We submit this brief instead to defend the validity, importance and efficacy of public financing systems generally, and to urge the Court to refrain from casting doubt on the validity of these systems, regardless of how the Court may resolve the narrow issue in this case.

In *Buckley* v. *Valeo*, 424 U.S. 1 (1976), the Court upheld the constitutionality of the provisions of the 1974 Federal Election Campaign Act ("FECA") that established a system of public financing for presidential elections. The Court expressly rejected the argument that "any scheme of public financing of election campaigns is inconsistent with the First Amendment." *Buckley*, 424 U.S. at 90. To the contrary, the Court recognized that the public financing system was "a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process." *Id.* at 92-93. Thus, the Court held, the presidential public financing system "furthers, not abridges, pertinent First Amendment values." *Id.*

In light of *Buckley*, a number of states – including Connecticut, Maine, Minnesota and North Carolina, in addition to Arizona – have adopted voluntary programs providing for public financing of certain state election campaigns. These programs have been

enacted to serve purposes similar to those underlying the presidential public financing system: "to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising." *Id.* at 91. In general, these programs have been extremely popular and successful within their states, and the basic constitutionality of these programs has been repeatedly sustained.

Petitioners are careful to distinguish the matching grant provisions at issue here from the public financing system upheld in *Buckley*, and make no effort to challenge the validity of public financing systems generally. *See, e.g.*, Brief for Petitioners at 57-58, 69-70, 78-79. Some of petitioners' *amici*, however, are not nearly so scrupulous, and urge this Court to take this occasion to call into question the validity *vel non* of all public financing systems. *See, e.g.*, Brief of *Amicus Curiae* Center for Competitive Politics in Support of Petitioners at 5-9.

We urge the Court to resist this invitation. Contrary to the claims of petitioners' *amici* that there is no evidence public financing systems have accomplished any valid purpose, the presidential public financing system has been an unqualified success for more than 35 years. While the system needs to be updated to maintain its relevance in light of the increased cost and fundraising capacity of presidential campaigns, the presidential public financing system has been used by the great majority of credible presidential candidates, across the political spectrum, since its enactment. From 1976 through 2004, every major party presidential nominee chose public funding in the general election, as did John

McCain in 2008. These general election grants freed candidates of both major parties from the need to raise money during the most crucial phase of the presidential campaign, and gave them more time to make their case to the electorate.

Similarly, the majority of contenders for the Republican and Democratic Party presidential nominations have chosen to participate in the public matching funds program applicable to primary election contests. Public matching funds in the primaries have particularly benefited candidates, in both major parties, who were lesser-known or who were challenging their party's establishment, including Ronald Reagan in 1976, Pat Robertson in 1988, and Patrick Buchanan in 1992. By virtue of their success in soliciting small contributions from a broad base of individual donors, public financing has provided these candidates with the resources to mount competitive campaigns and to present their case to the voters, particularly in the crucial early primary states. Public financing has not only served to promote competition in elections and to provide more meaningful choices to voters, but it has also helped to ensure that more candidates have the opportunity to share their views with the electorate.

Public financing has accomplished these objectives while at the same time largely eliminating corruption or the appearance of corruption from the presidential election process, one of the legislation's primary purposes. The public financing system was adopted in large part to address the abuses of the 1972 presidential campaign – including secret slush funds and secretive hand-offs of bags of money – which were revealed in the Watergate scandal.

The Court should take care in its opinion not to call into question the validity of the presidential public financing system, or the validity of the various public financing programs that have been adopted by the states and municipalities. Several of the state and local programs, including the Arizona measure before the Court, were adopted in the wake of serious corruption scandals; all were intended to create a system of public financing of the specified state and local elections that reduced or eliminated the risk or appearance of corruption. Each of the state and local systems varies considerably in its details. The states and local governments should be free to adopt public financing systems that respond to local needs and conditions, unless and until a particular provision is shown on a full record to impermissibly burden constitutional rights. It is well settled that the states are principally responsible for choosing their own system of elections, and the Court should be very reluctant to limit the states' ability to choose public financing as a component of the states' election mechanisms.

ARGUMENT

I. Public Financing at the Federal Level: The Presidential Public Financing System Upheld in *Buckley* v. *Valeo*.

Congress responded to the financial abuses that occurred in the 1972 presidential election and those revealed by the Watergate investigations by enacting the 1974 Federal Election Campaign Act, now codified at 2 U.S.C § 431 *et seq.*, 26 U.S.C. § 9001 *et seq.*, and 26 U.S.C. § 9031 *et seq.* One of the hallmarks of this legislation was the creation of a voluntary program of public funding for presidential cam-

paigns. This innovative reform – which remains the model for public financing systems adopted by states and local governments throughout the United States – was designed to establish a safeguard against corruption in the political system, by reducing the emphasis on fundraising in presidential campaigns and diminishing the influence of large private donations. *See* S. Rep. No. 93-689, at 5 (1974). FECA also sought to reduce the influence of wealthy interests by promoting the participation of donors of small sums in the financing of presidential campaigns. *Id.* at 6-7. Further, due to congressional concerns about the effects of rising campaign expenditures, *id.* at 5, FECA required candidates and parties who opted to accept public money to agree to limits on their campaign spending. 26 U.S.C. §§ 9003(b), (c); 9008(d)(1), (d)(2); 9033(b)(1).

The presidential public funding system provides support to candidates or national party committees at each stage of the presidential selection process. In the prenomination or primary election period, a candidate may qualify for public matching funds on a dollar-for-dollar basis for the first $250 contributed by any individual donor. 26 U.S.C. § 9034(a). To be eligible for such primary election matching funds, a candidate must raise a threshold amount from private contributions in at least 20 states, counting only the first $250 donated by each contributor, 26 U.S.C. §§ 9033(b)(3), (4), and must agree to limit personal contributions to his or her own campaign to a maximum of $50,000. 26 U.S.C. §§ 9033(b)(1), 9035(a). The candidate must also agree to abide by state-by-state aggregate spending limits, and agree to a post-election financial audit of campaign funds, conducted by the Federal Election Commission. 26

U.S.C. § 9033(a)(3). Candidates who meet these requirements may receive matching funds on qualified individual contributions received after January 1 of the year preceding the election year, and may receive public funds up to a maximum of half of the candidate's aggregate spending limit. 26 U.S.C. §§ 9034(a), (b).

In the general election campaign, candidates can choose to receive a public grant that provides full funding for his or her campaign. *See* 26 U.S.C. § 9003. The amount of the grant is based on a formula set out in the statute, which set an initial limit in 1974 of $20 million, plus adjustments for inflation. By 2004, the amount of the grant had risen to $74.6 million. *See* Anthony Corrado, *Public Funding of Presidential Campaigns*, *in* THE NEW CAMPAIGN FINANCE SOURCEBOOK 180, 193 (Anthony Corrado, Thomas E. Mann, Daniel R. Ortiz & Trevor Potter eds., 2005). In 2008, the grant amount increased again to $84.1 million. *See* Federal Election Commission, *Presidential Election Campaign Fund (PECF)*, http://www.fec.gov/press/bkgnd/fund.shtml (last visited Feb. 16, 2011). To be eligible for public financing, a candidate must be the presidential nominee of a party that qualifies for funding under the terms of the statute. 26 U.S.C. § 9003. As in the primaries, a participating candidate must also agree to abide by the spending limit, restrict any personal contributions to a maximum of $50,000, and agree to a post-election financial audit. 26 U.S.C. §§ 9003, 9004. A candidate who did not accept public financ-

ing in the primaries may nevertheless choose to receive public financing in the general election.[3]

The program also offers national party committees the option to accept a grant to finance the expenses incurred for a presidential nominating convention. The amount of this grant was originally set in 1974 at $2 million, plus adjustments for inflation, but the base amount was subsequently increased in 1979 and 1984. *See* Corrado, *Public Funding of Presidential Campaigns*, *supra*, at 190. By 2008, the amount provided to each of the major parties was $16.8 million. *See* Federal Election Commission, *Presidential Election Campaign Fund*, *supra*. As with gen-

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[3] The law distinguishes between major party nominees and minor party nominees for purposes of determining the amount of the general election grant. A major party nominee, defined as the nominee of a party that received at least 25 percent of the vote in the previous presidential election, is eligible to receive the full amount of the grant. A minor party nominee or independent candidate is eligible for a proportionate share of the full amount, based on the proportion of the major parties' average vote share represented by the minor party's or candidate's share, provided that the minor party or candidate received at least five percent of the vote in the previous election. 26 U.S.C. § 9004(a)(3). Thus, in 1996, Reform Party nominee Ross Perot received $29.1 million in general election public funding, slightly less than half of the full $68.1 million received by each major party nominee that year, based on the proportionate share of the general election vote that Perot received in 1992. *See* Corrado, *Public Funding of Presidential Campaigns*, *supra*, at 194. A participating minor party candidate may raise additional private contributions, subject to generally applicable contribution limits, to make up the difference between the amount of the minor candidate's grant and the amount of the full grant awarded to a publicly financed major party contender.

eral election funding, a minor party committee can qualify for a proportionate share of the amount provided to each major party, based on the vote in the previous presidential election, provided that the minor party's nominee received at least five percent of the vote. 26 U.S.C. §§ 9003(c), 9008(b)(2).

This Court upheld the constitutionality of these provisions in *Buckley*, 424 U.S. at 90-109, and rejected the argument that such a system of public financing of election campaigns was inherently inconsistent with the First Amendment. The Court emphasized that the public financing system was "a congressional effort . . . to use public money to facilitate and enlarge public discussion and participation in the electoral process," and therefore "furthers, not abridges, pertinent First Amendment values." *Id.* at 93.[4] Moreover, the Court held, "it cannot be gainsaid that public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest." *Id.* at 96.[5]

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[4] The Court explained the purposes of the presidential public financing system as "to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising." *Buckley*, 424 U.S. at 91 (citing S. Rep. No. 93-689, 1-10 (1974)).

[5] The Court rejected additional constitutional challenges to the presidential public financing system in *Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280 (S.D.N.Y.) (three-judge court), *aff'd*, 445 U.S. 955 (1980).

II. The Success of the Presidential Public Financing System.

Since 1976, the first presidential election in which public funds were available, every presidential election has been financed in part with public funds. From 1976 through 2004, every major party presidential nominee relied on public money for the financing of his general election campaign, and John McCain did so in 2008; only Barack Obama in 2008 opted to decline the general election grant, because of his ability to raise extraordinary sums that far exceeded the current amount of the public grant. In every election cycle since 1976, through and including 2008, both the Democratic and Republican national party committees have accepted public money to finance their presidential nominating conventions. And the great majority of presidential candidates since 1976 have relied upon the public matching grants available during the primary elections. Indeed, from 1976 through 1996, every candidate who won the nomination of one of the major parties did so with the assistance of public matching funds.[6]

Public funding has provided substantial support to a wide range of presidential aspirants. Republicans and Democrats alike, as well as some minor party candidates and a minor party committee, have

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[6] In the eight presidential elections from 1976 through 2004, presidential candidates and national party committees received more than $1.3 billion in public funds. *See* Corrado, *Public Funding of Presidential Campaigns*, *supra*, at 182. Candidates seeking their party's nomination received about $342 million of public money in total during this period; general election contenders received a total of $839 million; and national party committees qualified for a total of $152 million. *Id.*

participated in the program. Democratic contenders and their national party committee received $646 million of public funding through the 2004 election, while Republican candidates and their national party committee received $628 million. Minor party candidates and one minor party committee received a total of $60 million. Corrado, *Public Funding of Presidential Campaigns*, *supra* at 182.[7]

In the first two decades of experience under the public funding programs, the vast majority of contenders for the Republican and Democratic presidential nominations chose to participate in the public matching funds program. Of all the candidates who ran for the Democratic or Republican nomination in the six elections between 1980 and 2000, only six candidates, all Republicans, decided to forgo public money during the primary campaign: John Connally in 1980; Malcolm "Steve" Forbes, Robert Dornan, and Maurice Taylor in 1996; and Forbes, George W. Bush and Orrin Hatch in 2000. Anthony Corrado, BEYOND

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[7] Democrats have qualified for a slightly larger amount of public funding over the course of the program principally because of the greater number of contested Democratic presidential nomination races during this period, which led to a greater number of candidates qualifying for primary matching funds. In all, 91 challengers for a presidential nomination in the elections from 1976 through 2004 qualified for and accepted primary campaign matching funds, including 53 Democrats, 29 Republicans, and 9 minor party aspirants. *See* John C. Green, *Financing the 2004 Presidential Nomination Campaigns*, *in* FINANCING THE 2004 ELECTION 93, 121 (David B. Magleby, Anthony Corrado & Kelly Patterson eds., 2006).

THE BASICS: CAMPAIGN FINANCE REFORM 60-61 (2000).[8]

Presidential aspirants embraced public funding because the public grants proved to be an invaluable resource. The general election grants alone freed candidates of the need to raise money and gave them more time to make their case to the electorate. *Id.* Without public funding, candidates would have to spend most of their time between July and November raising funds in order to accrue the tens of millions of dollars needed to mount a national campaign. The public option also helped to hold down campaign expenses, since candidates did not have to spend the millions of dollars needed to generate the sums offered through public funding.

Primary campaign matching funds have also proved to be an important source of support for presidential candidates. In each election between 1976 and 1996, about a third of the monies raised by presidential contenders came from the public match. Corrado, *Campaign Finance*, *supra* at 60-61. Public financing has particularly benefited candidates who challenged their party's establishment, or lesser-known aspirants. Public funding has provided these candidates with the resources to mount viable campaigns and to present their case to the voters. This is particularly true in the crucial early primary states. For many candidates, public funding was the source of sorely needed funds at crucial points in a presidential race. In this way, public funding has not only served to promote competition in elections and provide more

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[8] In addition, in 1992, independent presidential candidate H. Ross Perot chose not to participate in public funding in his unorthodox campaign for the presidency. *See id.*

meaningful choices to voters, but it has also helped to ensure that more candidates have the opportunity to share their views with the electorate.

For example, conservative candidates such as Republicans Pat Robertson in 1988 and Patrick Buchanan in 1992 received large sums of public money in their bids for the presidency by successfully soliciting small contributions from a broad base of individual donors. Robertson raised $20.6 million in 1988 and accrued $9.7 million in matching funds. Buchanan raised $7.2 million in 1992, which generated $5 million in matching funds. *Id.* at 61. Similarly, liberal candidates such as Democrats Jesse Jackson in 1984 and 1988 and Jerry Brown in 1992 derived the majority of their campaign funds from smaller donations and thus qualified for substantial amounts of public money. Jackson raised a combined $17.4 million from individuals in his two bids for the presidency and accrued $10.7 million in matching funds; Brown chose to accept only individual donations in small amounts in his 1992 bid for the Democratic nomination, and raised $5.2 million in private contributions that were matched with $4.2 million in public funds. *Id.*

But no candidate benefitted from public funding more than Ronald Reagan. Due to his broad base of supporters throughout the nation, Reagan was able to capitalize on his small-donor fundraising capacity to accrue substantial sums of public money. During his 1976 primary challenge to incumbent President Gerald Ford, for example, Reagan had less than $44,000 in campaign money left at the end of January, while President Ford had fifteen times more cash on hand. The $1 million in public funds that

Reagan received in January and the additional $1.2 million that he received in February were pivotal in allowing Reagan to continue his campaign. *See* Michael J. Malbin, *Are Matching Funds Only "For Losers"? A Post-2004 Vision for a Renewed Public Funding System*, WELFARE FOR POLITICIANS? TAXPAYER FINANCING OF CAMPAIGNS 251, 256 (John Samples ed., 2005). Reagan was once again short of cash at the end of March, and was able to continue his campaign only as a result of a further infusion of public money. *Id.*

Even in 1984, when as President he was seeking reelection without significant opposition within his own party, Reagan raised about 60 percent of the funds for his campaign from small donors and, as a result, received $9.7 million in matching funds. *See* Anthony Corrado, *The Changing Environment of Presidential Campaign Finance*, *in* IN PURSUIT OF THE WHITE HOUSE: HOW WE CHOOSE OUR PRESIDENTIAL NOMINEES 233 (William G. Mayer ed., 1996). Notably, this was the maximum amount of public money a primary candidate could receive in accordance with the law at the time. To this day, President Reagan remains the only candidate to ever reach the public funding primary campaign maximum. *See id.* at 233-34.

The availability of public funding has also made it possible for minor party candidates to share their views with the electorate. In every presidential election since 1984, at least one minor party candidate has qualified for and received public matching funds. In the 2000 campaign, for example, three minor party candidates – one each from the Reform Party, the Natural Law Party, and the Green Party –

received public matching funds. *See* Green, *Financing the 2004 Presidential Nomination Campaigns*, at 121.

This history shows the invalidity of the claim by the Center for Competitive Politics that there is no evidence public financing has furthered any of its goals. *See* Brief of *Amicus Curiae* Center for Competitive Politics in Support of Petitioners at 4, 5-9. While the presidential public financing system needs to be updated and grant levels increased to maintain its relevance in light of the increasing expense of presidential campaigns, the presidential public financing system has demonstrably increased competition and voter choice. It has provided challengers who have grass-roots support with the resources to mount viable and competitive campaigns. For many candidates, public funding has been the source of sorely needed funds at crucial points in their races, and provided them with funding that permitted them to continue their campaigns. Public funding has provided important support to independent candidates, increasing the diversity of voices and views presented to the electorate. It has enabled presidential nominees to put aside the needs of fundraising during the crucial final months of the campaign, and allowed them to concentrate on making their case to the electorate. Public funding has thus served to promote competition in elections, provide more meaningful choices to voters, and free candidates to focus on presenting their views to the electorate rather than raising campaign contributions. And in so doing, it has simultaneously removed from presidential campaigns the greatest source of potential corruption and the appearance of corruption, the

need for candidates to solicit large contributions from donors.

III. The Constitutionality of Arizona's Matching Grants.

The voters of Arizona adopted the state's public financing system through an initiative measure approved in the 1998 elections. *See McComish* v. *Bennett*, 611 F.3d 510, 514 (9th Cir. 2010). As the Ninth Circuit noted, the "Citizens Clean Elections Act" was passed in the wake of a long series of serious corruption scandals involving Arizona public officials, including the indictment of two of its governors. *Id.* It is readily apparent – from the historical context in which it was adopted, from the ballot pamphlet's explanation of its purposes, indeed, from the very name of the Act – that one of its principal purposes was to prevent political corruption and to reduce the public's perception that Arizona politics were irrevocably broken. Indeed, the voter information pamphlet stated that the central goal of the legislation was to "improve the integrity of Arizona state government" by, among other things, "diminishing the influence of special-interest money." Ballot Propositions Publicity Pamphlet for the 1998 Ariz. General Election, http://www.azsos.gov/election/1998/info/pubpamphlet/prop200.pdf. *See McComish*, 611 F.3d at 514-15.

The matching grant provisions of the Arizona law are constitutional, and should be upheld. It is well settled that the states have a sufficiently important interest to justify adoption of campaign finance regulations that combat corruption and the appearance of corruption, *see, e.g., Davis* v. *FEC*, 554 U.S. 724, 737 (2008); *McConnell*, 504 U.S. at 136, and the

Ninth Circuit reasonably concluded that one of the principal purposes of the Act was to reduce *quid pro quo* corruption. *See McComish*, 611 F.3d at 515-16. The matching grant provisions were intended to encourage participation in the state's public financing system, *see id.* at 526, and the state – having decided to establish a public financing system – has an equally important interest in adopting measures to incentivize participation and attempt to ensure that the system is successful in reaching its anti-corruption goals. *See Rosenstiel* v. *Rodriguez*, 101 F.3d 1544, 1553 (8th Cir. 1996) (holding that the state had "a compelling interest in stimulating candidate participation in its public financing scheme"); *Vote Choice, Inc.* v. *DiStefano*, 4 F.3d 26, 39-40 (1st Cir. 1993) (same).

Moreover, the challenged matching grant provisions do not significantly burden the First Amendment rights of non-participating candidates or independent spenders. As the Ninth Circuit found, the record does not support petitioners' claims that the matching grant provisions created any meaningful disincentive against them exercising their First Amendment rights to the fullest extent in support of their campaigns. *See McComish*, 611 F.3d at 522-25. In the absence of any evidence that the matching grant provisions in fact impose a severe burden on petitioners' speech, the logical or theoretical argument that it could conceivably have that effect does not create a sufficient burden on First Amendment rights to hold them unconstitutional. *See McComish*, 611 F.3d at 525; *see, e.g.*, *Rosenstiel*, 101 F.3d at 1552-53; *Vote Choice*, 4 F.3d at 40.

IV. The Validity of State and Local Public Financing Systems Generally.

Even if the Court concludes that the matching grant provisions are problematic, however, there is no occasion for the Court to address any broader issue involving the constitutionality of public financing systems generally, and the Court should avoid any ruling that might call into question their constitutionality.[9]

In the wake of *Buckley*, the states have adopted a diverse array of public financing statutes, which vary considerably in their details. As of 2009, twenty-four states operated some system of public financing. These programs range from full public financing to qualified candidates running for certain state offices, offered by Arizona, Connecticut, Maine, New Mexico and North Carolina, to a tax credit to individuals who make a political contribution in their state, provided by six states. Jessica A. Levinson, Center for Governmental Studies, *State Public Financing Charts*, at 1 (2009).[10] Each state's public financing laws take different positions on questions such as whether funding should apply to primary elections;

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[9] Petitioners have not challenged any other aspect of the Arizona public financing system.

[10] The states which have adopted some form of public financing system are: Arizona, Arkansas, Connecticut, Florida, Hawaii, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, Utah, Vermont, Virginia, and Wisconsin. *Id.* The Center for Governmental Studies report also listed Idaho among the states with public financing programs, but Idaho repealed its program effective January 1, 2010.

whether payment should be made in the form of matching funds, lump sum payments, or both; what factors should determine the amount of the payment; and what entity should receive the funding – the candidate or the political party. For example, Florida, Massachusetts, and Michigan each provide matching funds to qualifying candidates for certain statewide offices for both primary and general elections. *Id.* By contrast, Iowa provides funding to political parties, and only for the general election. *Id.* Minnesota offers a variation on that program, providing lump sum payments to qualifying candidates for certain statewide offices, to state committees of political parties, and to the state general fund for administrative purposes. *Id.*

In addition, a number of local governments have adopted some form of public financing system. Most notably, the City of New York has adopted a system which provides qualified candidates with matching funds for the first $175 in contributions received from any donor, at a rate of $6 in matching funds for every $1 in contributions. New York City Campaign Finance Board, *Public Matching Funds*, http://www.nyccfb.info/candidates/candidates/publicmatchingfunds.aspx (last visited Feb. 7, 2011). Similarly, Albuquerque, New Mexico provides significant public financing to qualifying candidates. Other cities providing at least partial public financing to local candidates include Miami, Florida; Austin, Texas; Boulder, Colorado; and several cities in California. *See* Jessica Levinson & Smith Long, Center for Governmental Studies, *Mapping Public Financing in American Elections*, at 3 (2009).

There have been several lawsuits challenging these public financing systems, but their validity has generally been sustained, against a broad variety of constitutional claims. *See N.C. Right to Life Comm. v. Leake*, 524 F.3d 427 (4th Cir. 2008) (upholding North Carolina system for public financing of judicial elections); *Daggett v. Comm'n on Governmental Ethics and Election Practices*, 205 F.3d 445 (1st Cir. 2000) (upholding constitutionality of Maine's Clean Election Act); *Vote Choice*, 4 F.3d at 40 (upholding provisions of Rhode Island public financing system); *Rosenstiel*, 101 F.3d at 1565 (upholding constitutionality of Minnesota's public financing system); *Wilkinson v. Jones*, 876 F. Supp. 916 (W.D. Ky. 1995) (upholding constitutionality of provisions of Kentucky's public financing system); *see also Green Party v. Garfield*, 616 F.3d 213 (2d Cir. 2010) (upholding constitutionality of Connecticut's public financing system generally, even while holding its matching grant provisions unconstitutional).

The Court in this case should avoid any ruling that would call into question the validity of these diverse state and local public financing systems. The states should have the flexibility to adopt public financing systems that are adapted to their local needs, conditions, and histories. *See Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 393-94 (2000) (relying on evidence of local history and conditions to support constitutionality of state contribution limits). This is particularly true since public financing programs are generally intended to reduce political corruption and to restore public confidence in the integrity of state and local government, and are often adopted, as in Arizona, in the wake of corruption scandals. *See Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) ("A State

indisputably has a compelling interest in preserving the integrity of its election process") (internal citations omitted). Absent a record demonstrating that a particular provision has an impermissible impact on First Amendment rights, the Court's ruling should leave room for the states to continue to experiment with these public financing systems.

The Court has repeatedly recognized, in a variety of election-related contexts, that the states have "broad power . . . over the election process for state offices" with which this Court should be reluctant to interfere. *Wash. State Grange* v. *Wash. State Republican Party*, 552 U.S. 442, 458 (2008) (internal citations omitted); *see Storer* v. *Brown*, 415 U.S. 724, 730 (1974) (states have long been primarily responsible for regulating elections, including registration, eligibility, ballot and vote-counting requirements); *Crawford* v. *Marion County Election Board*, 553 U.S. 181, 208 (2008) (Scalia, J., concurring) ("detailed judicial supervision of the election process would flout the Constitution's express commitment of the task to the States"). As the Court observed in *Oregon* v. *Mitchell*, 400 U.S. 112, 124-25 (1970), "[n]o function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters . . . and the nature of their own machinery for filling local public offices." The Court has thus repeatedly recognized that "the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections," and that "[e]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be

chosen." *Gregory* v. *Ashcroft*, 501 U.S. 452, 461-62 (1991) (internal citations omitted); *accord Northwest Austin Mun. Utility Dist. No. One* v. *Holder*, 129 S. Ct. 2504, 2520 (2009).

These fundamental principles of federalism suggest that the Court should tread cautiously before issuing a ruling that could undermine the validity of state public financing statutes.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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